

**SANITIZED DEC. 04-482 C – BY GEORGE V. PIPER – SUBMITTED FOR
DECISION 12/17/04 – ISSUED 01/11/05**

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX -- TAXABLE RENTAL OF EQUIPMENT WITH OPERATOR -- The activity of concrete pumping and placement performed for a general contractor is not exempt from consumers' sales and service tax as a contracting activity, pursuant to 110 C.S.R. 15, § 129.5.2.1.a (May 1, 1992), because the activities are very similar to those undertaken by redi-mix concrete businesses, and the control aspect or supervision by the general contractor is even greater because of the various ways in which the general contractor is called upon to assist or otherwise direct the concrete pumping and placement.

CONSUMERS' SALES AND SERVICE TAX--PUMPING AND PLACEMENT OF CONCRETE IS NOT CONTRACTING -- Definition of contracting as interpreted in 110 C.S.R. 15, § 107.3.4.1 (May 1, 1992) does not encompass the mere pumping and placement of concrete without concrete finishing also being performed.

FINAL DECISION

A Tax Examiner with the Auditing Division conducted an audit of the books and records of the Petitioner. Thereafter, the Director of the Division issued a consumers' sales and service tax assessment against the Petitioner. This assessment was issued pursuant to the lawful authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. This assessment was for the period of January 1, 1999 through December 31, 2001, for tax, interest through February 28, 2002, and no additions to tax for a total assessed liability. Written notice of this assessment was served on the Petitioner.

Thereafter, the Petitioner filed a petition for reassessment, by mail postmarked May 15, 2002. Although said petition for reassessment was found to be untimely filed by this tribunal, upon appeal the Circuit Court of Kanawha County reversed, finding that the untimely filing was due to excusable neglect caused by Petitioner's accountant's family

circumstances and that Petitioner was entitled to a full hearing on the merits of its petition for reassessment. Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and 121 C.S.R. 1, § 61.3.3 (Apr. 20, 2003).

FINDINGS OF FACT

1. During the assessment period the Petitioner was engaged in the business of concrete pumping and placement, to-wit: a contractor calls Petitioner to order a piece of machinery to place concrete for a certain project, whether it be walls, footers, or slab; as well as to direct Petitioner to place the concrete from Point A to Point B.

2. Petitioner works on various types of jobs in West Virginia. Some examples of the types of construction projects on which Petitioner's trucks pump concrete are: Roadwork. (Tr. p. 17). A slab on grade for an office building; a floor. (Tr. p. 23-24). Rip-rap for a coal mine. (Tr. p. 25). Fifth floor of a coal preparation plant. (Tr. p. 26). Bridge pier. (Tr. p. 26). State bridge decks. (Tr. p. 26). Walls for a house (Tr. p. 27). Locks and dams. (Tr. p. 27). Bridge and dam piers. (Tr. p. 29). Styrofoam house. (Tr. p. 29). Foundation for a silo. (Tr. p. 30).

3. Petitioner does not actually supply the concrete itself. It is supplied by the contractor, or a subcontractor concrete supplier.

4, The Commissioner's position is that concrete pumping is considered to be a taxable service as previously held by the State Tax Commissioner's former Office of Hearings and Appeals in the Tri-State Concrete Pumping (Tri-State") case which is currently on appeal in circuit court.

5. Petitioner owns five (5) trucks, three (3) of which have a large boom and a pipeline that delivers the concrete. Two of them are truck-mounted pumps that deliver concrete through a pipeline laid out on the ground.

6. A typical large truck costs a lot more than a small truck with a mounted pump. Some large contractors could own their own pumping and placement trucks and perform the same service as Petitioner, but it is cheaper for smaller contractors to hire Petitioner, depending on the size of the contractor and the amount of work they have, and whether it's feasible for them to own their own machine.

7. At the job site the ready-mix truck backs up to Petitioner's machine. On the back of Petitioner's machine is a hopper. Petitioner's truck driver directs the concrete delivery truck to start emptying the concrete from its truck into Petitioner's hopper. When it comes out of the ready-mix truck into the back of Petitioner's hopper, a valve and two hydraulic pistons force the concrete through the boom and through the pipe from the truck site, to Point B, where the contractor needs the concrete on the job site. Petitioner's concrete delivery process is all hydraulically operated.

8. Petitioner's trucks can pump the concrete a maximum of twelve hundred (1,200) feet, although the usual length from the truck to where a contractor would need to load concrete is about one hundred feet.

9. It is undisputed that all of the jobs on which Petitioner works are construction projects.

10. Petitioner is usually brought onto a job by a general contractor or a builder or by a manufacturer such as the owner of a plant or factory.

11. Petitioner's equipment and methodology represents the latest technology in concrete delivery systems. It is an advancement over the old system of building

arrangement to get a concrete truck or to get a bucket out to the place where the concrete is needed, whether by crane or another type apparatus. Petitioner's equipment is faster than the typical boom and bucket.

12. On a normal job, Petitioner has one operator and the machine. If the pipeline hose needs to be moved around however, the contractor supplies laborers for that, while Petitioner's employee is the one operating the pump. Petitioner does not perform any concrete finishing. (Petitioner's operator only runs the pump and boom).

13. The contractor tells Petitioner where it wants to start with the concrete or what it wants to do that day. Petitioner's employee, who operates the machine, then gets the hose moved to the general location, within a six-foot area of where the elastic line can move back and forth. Petitioner's operator starts the process but Petitioner's employee cannot start until the contractor is ready to receive.

14. By Petitioner's own admission, concrete pumping requires some vibrating of the concrete to keep from having voids (air pockets) which would not allow the concrete to "set right." The one doing the vibrating in each case is the general contractor and his laborers. (Tr. pp. 48-49, 55).

15. Petitioner does have a contractor's license issued by the West Virginia Contractor's Licensing Board.

DISCUSSION

Because the Commissioner has agreed that the general contractors, for whom the Petitioner works, as per contract, are engaged in constructing capital improvements, the

only issue to be determined is whether the Petitioner is correct in saying that it, too, is performing contracting services as would any other subcontractor.

“Generally, subcontractors who furnish services to prime contractors in fulfillment of the prime contractor’s contract resulting in a capital improvement to a building or other structure or to real property are treated as contractors.” 110 C.S.R. § 107.2.1.2 (May 1, 1992).

It is the Commissioner’s position, however, that Petitioner’s activities are subject to tax as a taxable service pursuant to 110 C.S.R. 15, § 129.5.2.1.a (May 1, 1992), which states:

A lease of equipment and an operator to a contractor for use in providing tax exempt contracting services will be treated as a tax exempt subcontract only when the contractor can exercise no control (beyond specification of desired results or work to be accomplished) or supervision over the equipment and the operator thereof. In such a case the denominated lessor is viewed as a subcontractor providing equipment and labor in fulfillment of a contract with a prime contractor.

Commissioner’s counsel posits that the facts in this case, which are identical to those in the Tri-State Concrete Pumping case (on appeal in circuit court), clearly show several instances where the general contractor exercises a degree of control or direction over the Petitioner’s equipment and employee(s), specifically: (1) the required vibrating of the concrete is performed by the general contractor and not the Petitioner; (2) the concrete mixing truck, which provides the supply of concrete to the Petitioner, is the responsibility of the general contractor; (3) the individual operating the concrete mixing truck is employed by the general contractor and not the Petitioner; (4) the general contractor and not the Petitioner is the one who employs laborers to move the hose and/or the pipe; and (5) if the pumping equipment needs to be hoisted, lowered or moved into a certain position, that is also the general contractor’s responsibility.

In response Petitioner’s counsel argues the following:

W. Va. Code § 11-15-2 [2001]. “Definitions. For purposes of this article:...

“(c) ‘Contracting’:

(1) *In general.* – ‘Contracting’ means and includes the **furnishing of work**, or both materials and work, **for another** (by a sole contractor, general contractor, prime contractor or subcontractor) **in fulfillment of a contract for the construction**, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, or for removal or demolition of a building or **structure, or any part thereof**, or for the alteration, improvement or development of real property.

* * *

....

(3) *Special rules.* – For purposes of this definition:

(A) The term ‘structure’ includes, but is not limited to, everything built up or composed of parts joined together in some definite manner and attached or affixed to real property, or which adds utility to real property or any part thereof, or which adds utility to a particular parcel of property and is intended to remain there for an indefinite period of time[.]”

(s) ‘Service’ or ‘selected service’ includes all nonprofessional activities engaged in for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible personal property, but **shall not include contracting**, personal services or the services rendered by an employee to his employer or any service rendered for resale.”

(emphasis by Petitioner)

Petitioner’s counsel then asserts that because Petitioner is required by law to have a West Virginia contractor’s license; and provides a contracting type of performance (pumping from point A to point B on the contracting job site; and provides “work” (pumping concrete) in the building of an artificial structure exempt under the statutory definition of contracting; and which represents the providing of a tax-exempt service exclusively to contractors for resale, but then again exempt as a contracting service under the services definition; no tax can be imposed. Petitioner’s counsel even asserts that the Tax Commissioner prevailed using Petitioner’s argument in *Koppers Co. v. Dailey*, 167 W. Va. 521, 280 S.E.2d 248 (1981), when the old business and occupation tax on contracting was in force.

Notwithstanding Petitioner’s testimony concerning its own unfettered control over its concrete pumping and placement, or Petitioner’s counsel’s erroneous legal conclusion that if “work” is ultimately performed on the site Petitioner must be engaged in

contracting, two (2) inescapable facts were never addressed by the Petitioner. First, but for its utilization of a large boom and an extendable hose, there is very little difference between what the Petitioner does and what a redi-mix concrete truck does: both utilize concrete pumping equipment and both pump concrete into prepared forms. In that regard it should be noted that in this case the Petitioner did no concrete finishing, which normally consists of screening, leveling, bullfloating, and/or troweling (flattening), which is done by use of a specific machine and which would have constituted the activity of contracting. Secondly, the control that a general contractor has over the activities of the Petitioner, as compared with the control of a general contractor with respect to a redi-mix concrete truck operator, is even greater here, because of the various ways in which the general contractor is called upon to assist or otherwise direct the Petitioner.

Accordingly, it is **DETERMINED** that the Petitioner's business activities limited solely to concrete pumping and placement are not exempt from consumers' sales and service tax, pursuant to 110 C.S.R. 15, § 129.5.2.1.a (May 1, 1992), because Petitioner's business is essentially identical to that conducted by redi-mix concrete businesses, which are not contractors, and because the control exercised by a general contractor over the activities of concrete pumping and placement is greater than with respect to redi-mix concrete activities, because of the many ways in which the general contractor must assist with concrete pumping and placement.

It is further **DETERMINED** that the definition of "contracting" as interpreted in 110 C.S.R. 15, § 107.3.4.1 (May 1, 1992) does not encompass the mere pumping and placement of concrete without concrete finishing also being performed.

CONCLUSIONS OF LAW

Based upon all of the above it is **HELD** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon a petitioner-taxpayer to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] 121 C.S.R. 1, § 63.1 (Apr. 30, 2003).

2. In light of the foregoing discussion, the Petitioner-taxpayer in this matter has failed to carry the burden of proof with respect to the issue of whether the rental of equipment with operator for the mere pumping and placement of concrete should be considered a contracting activity.

DISPOSITION

WHEREFORE, it is the **DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers' sales and service tax assessment issued against the Petitioner for the period of January 1, 1999 through December 31, 2001, for tax, interest, and no additions to tax, should be and is hereby **AFFIRMED**.

Interest continues to accrue on this unpaid consumers' sales and service tax until this particular tax liability is fully paid.